U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

Westly Wade,
Claimant

v.

Baltimore Marine Industries and AIG Insurance Co., of PA,
Employer/Carrier

and

Director, Office of Workers' Compensation Programs,
Party-In-Interest

Date Issued: 1-31-01

Case No.: 2000-LHC-1859

OWCP No.: 04-34677

Randolph Blair, Esquire
For the Claimant

Heather Kraus, Esquire
For the Employer

Before: Linda S. Chapman
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended, 33 USC § 901, et seq. (hereinafter "LHWCA" or "the Act"). A hearing was held before me in Baltimore, Maryland, on August 31, 2000, at which time the parties were given the opportunity to offer

testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits[1] 1 through 4 and Employer's Exhibits 1 through 13 were admitted into evidence. Also admitted into the record were ALJ Exhibits 1 through 6. The Claimant's post-hearing brief was filed on October 2, 2000; the Employer's post-hearing brief was filed on November 2, 2000. I have reviewed and considered these briefs in making my determination in this matter.

I. Statement of the Case

The Claimant's Testimony

The Claimant testified at the hearing in this matter. At the time of the hearing, he was 24 years old. He started working at Baltimore Marine Industries (BMI) in January of 1999, as a handyman, which required him to do ship fitting and operate an overhead crane. At the time, he was also taking a welding course. On the date of the injury, the Claimant was working around railroad tracks, and his foot fell into a hole in the tracks. He was wearing hard-toed boots; he felt pain in the top part of his right foot immediately (TR 34-39).

After he was injured, the Claimant walked to the medical department, where an ice pack was put on his foot. He remained in the medical department for approximately 45 minutes to an hour, and then he went to Concentra Medical Center by cab. The Claimant's foot was x-rayed, but the x-rays did not show any broken bones. He was given ibuprofen, and released to return to work the same day. The Claimant was instructed to return for physical therapy the following day. He testified that he told Dr. Renie that his foot was sore, but Dr. Renie thought he was lying. Each time the Claimant went back to work, his foot swelled. He visited Concentra three or four times (TR 40-42, 74).

On around June 14, the Claimant visited Dr. Connelly, his personal physician. According to the Claimant, Dr. Connelly immediately believed that there was something wrong with his foot. He referred the Claimant to Dr. Gubernick, whom the Claimant saw two or three times. Dr. Gubernick performed a bone scan, instructed the Claimant to wear a post-operative shoe, placed the Claimant on light duty work and prescribed percocet and ibuprofen. He also prescribed physical therapy, which was done at Concentra during the month of July. Following the Claimant's return to work, from June 16 to June 24, 1999, he slept in a back room of the medical center. After two weeks, Mr. Hibler instructed the Claimant to "push paperwork." The Claimant ended up collecting trash in the shipyard during the last week and a half of his light duty period. Dr. Gubernick released the Claimant to full duty on August 2, 1999, and the Claimant worked from August 2 through August 6, 1999 (TR 43-48, 75-76).

Although it was unclear from the Claimant's testimony when he returned to full duty, he worked at full duty until August 26, 1999. The Claimant testified that his foot still hurt. He acknowledged that he lost some

[1]References to the transcript are denoted as "TR"; references to the Claimant's Exhibits, Employer's Exhibits, and ALJ's Exhibits are denoted as "CX," "EX," and "ALJX," respectively.

time after August 6, 1999, due to a cyst being removed by Dr. Connelly. He further acknowledged being out of work again until August 19, 1999, as a result of congestion and an ear infection. The Claimant worked one more week, and then saw Dr. Altieri on August 31 at the suggestion of his attorney. Dr. Altieri instructed the Claimant to remain off work until September 27, and he did so without compensation. The Claimant could not recall why Dr. Altieri returned him to work on September 27 (TR 48-50, 76-77, 86).

On September 29, 1999, the Claimant returned to work, with a note from Dr. Connelly indicating that he had been off work from September 27 to September 29 with a cold or flu-like symptoms. The Claimant missed work on September 29 because his drug screen was positive; it took a few days to determine that the test was in fact negative. On October 4, the Claimant saw Dr. Altieri. On October 5, Dr. Connelly took the Claimant off work for three days because of a hemorrhoid problem. The Claimant's next off work slip was provided by Dr. Altieri for the period of time from October 18 to October 20. On October 21, the Claimant visited the dispensary to inform the staff that he had been out with the flu (TR 77-81).

On October 25, Dr. Altieri referred the Claimant to Dr. Miller, who examined the Claimant's x-rays and records, and ordered a CAT scan. Dr. Miller saw the Claimant on several occasions and ordered that he remain off work. He put the Claimant in a cast for two months, which required him to use crutches. The cast did not improve the Claimant's foot condition. The Claimant then was given a post-operative brace with metal supports and straps, which also did not help. The Claimant now has a special brace for his foot which laces up and keeps the foot area very tight. In order to wear the brace, the Claimant must wear shoes that are three sizes too big. Dr. Miller recommended that the Claimant undergo surgery, but he has not had the surgery yet[2] (TR 50-56, 81).

The Claimant testified that before his work-related injury, he never had any problems with his foot or ankle, nor has his foot been injured since June of 1999 (TR 62-63). He participated in wrestling and football in school, and occasionally rode four-wheelers in the early to mid nineties (TR 72-74). Before working for BMI, the Claimant worked for UPS and for Ceranko as a machine technician. The Claimant began attending welding school at BMI in August 1998, with the Maryland Department of Education Division of Rehabilitation paying for the Claimant to attend. The Claimant continued to attend the welding program, which he described as "educational," while he was working at BMI, but he stopped after he was injured. Before going to welding school, the Claimant was out of work for two or three months (TR 63-72).

The Claimant has not looked for other work, because Dr. Miller has not released him to work. He testified that he cannot do any work, because his foot gives out on him constantly. The Claimant testified that he wants to get better so that he can go back to work. He would have the surgery tomorrow if he could, regardless of who paid for it. The Claimant indicated that Dr. Miller had agreed to forego his fee for the surgery, but the Claimant would still be responsible for the $20-25,000 required to pay the hospital. In order to have the surgery

[2] There is some dispute as to whether the Claimant's health insurance carrier has authorized payment for this surgery.

without insurance, he would have to pay one third of that amount up front. The Claimant denied having told Ms. Fowler, an emergency medical technician at Concentra, that he would not proceed with the surgery until BMI paid for it; rather, he told her that he was waiting for approval for his surgery (TR 81-85).

Testimony of Ms. Tracy G. Fowler

Ms. Fowler is employed as an emergency medical technician at Concentra Medical Centers on site at BMI. She has worked in the dispensary since April of 1999, and is familiar with the Claimant. As part of her work, Ms. Fowler maintained a file with the Claimant's doctor slips and off work slips. She recalled that in July of 2000, she asked the Claimant when he was having his surgery, and he indicated that he was not going to have it until BMI paid for it, that he should not have to pay for anything, and that BMI should pay for it. Ms. Fowler described the Claimant's demeanor as antagonistic. She interpreted the Claimant's statement to mean that he did not want his health insurance company to pay for the surgery. In the context of the conversation, she was asking him whether he was getting the surgery paid for under his health insurance (TR 88-94).

The Claimant has maintained his health insurance with HealthCare 2000 through BMI (TR 91).

American Radiology

In a letter dated June 23, 1999, Dr. Mark C. Davis reported to Dr. Connelly the results of a nuclear medicine limited three phase bone scan, which showed a slightly increased flow and hyperemia in the lateral aspect of the Claimant's right mid foot. Dr. Davis felt that this finding corresponded with the delayed uptake in that location, which in turn corresponded with the fifth metatarsal base. These findings were consistent with a subacute fracture at the base of the right fifth metatarsal, possibly due to avulsion of the peroneus brevis tendon. While the plain film examination did not show a displaced fracture, Dr. Davis felt that a followup plain film examination and an MRI to evaluate the peroneus tendons could be done if clinically indicated (CX 2: 11-12, EX 6: 1-2).

An August 31, 1999, an x-ray of the foot as read by Dr. Bennett Sweren showed no evidence of fracture, dislocation or other significant osseous or articular abnormality (EX 7).

In a letter dated September 7, 1999, Dr. Andrew Sonin reported to Dr. Lukcso that an MRI of the right foot showed "a small focus of increased marrow signal in the plantar lateral aspect of the cuboid, measuring less than 1.0 cm. in diameter" adjacent to the lateral cortex. He felt it could represent the residua of a stress fracture. Dr. Sonin found the marrow signal normal in the base of the fifth metatarsal and found the peroneus brevis tendon normal. Dr. Sonin discussed these results with Dr. Altieri (CX 2: 13-14; EX 8: 1-2).

Concentra Medical Centers and Baltimore Marine Industry Records

A First Report of Accident was completed on June 3, 1999 (EX 3). An Occupational Injury or Disease Record form was completed on June 3, indicating that the Claimant complained of pain in the right exterior of his

foot upon walking, extension, and flexion, as well as pain around the ankle. The Claimant had minor swelling with a small knot on the right exterior side of the foot. He was released to regular work on that date, and was referred to Concentra (EX 3).

Dr. William Renie initially examined the Claimant on June 3, 1999; the Claimant complained of mild, sharp pain in his right foot and ankle, occasioned by his falling between the railroad tracks and twisting his right foot and ankle (CX 3: 17, EX 3). An Activity Status Report indicated that the Claimant had a right ankle sprain and right ankle and foot pain, and that he should return to regular duty on June 3, and return for a follow-up visit. His anticipated date of Maximum Medical Improvement (MMI) was June 3, 1999 (EX 3). Someone at Concentra Medical Centers (the signature line includes two names, one of which appears to be Dr. Renie) diagnosed the Claimant with right ankle sprain on June 4, 1999, and recommended that he continue medication, continue on full duty, use an elastic ankle support and return on June 7 for a recheck (CX 3: 20, EX 3). Also on June 4, 1999, the Claimant was seen for a Therapy - Initial Evaluation Ankle/Foot (EX 3).

On June 7, 1999, Dr. Renie noted a negative x-ray of the right foot, diagnosed the Claimant with right foot strain, and recommended that he continue medication, remain on regular duty and return on June 9, 1999 (CX 3: 19, EX 3). An Activity Status Report was completed, and Dr. Renie diagnosed a right ankle sprain and recommended that the Claimant return to regular duty on June 7, 1999, with an anticipated date of MMI of June 9, 1999 (EX 3). The Claimant did not report for his June 9 follow-up appointment (EX 3). A note from Dr. Joseph Connelly dated June 14, 1999, indicates that the Claimant was under his care and would return to work on June 21, 1999 (CX 3: 18). The Claimant reported to the dispensary on June 17 to request his medical records. He indicated that he had been placed off work until after his bone scan (EX 3).

The Claimant was evaluated by Dr. Lukcso at BMI on June 24, 1999, at which time Dr. Lukcso noted that the x-rays were negative. He also reviewed the findings of the bone scan, which showed a subacute fracture at the base of the fifth metatarsal, possibly due to avulsion of the peroneus brevis tendon. With regard to the Claimant's physical examination, Dr. Lukcso stated that the Claimant walked into the center wearing tennis shoes, with a mildly antalgic gait. He had no brace, no support, no cane, and no crutches. Neither his ankle nor his foot were wrapped. The Claimant's ankle was not tender, and his range of motion was normal. There was no evidence of swelling, ecchymosis, or abrasions; however, there was mild firm swelling at the fifth metatarsal base, which Dr. Lukcso felt was related to the bony anatomy. The Claimant had tenderness in the mid plantar fascia upon direct palpation, but no calcaneus tenderness. Dr. Lukcso's impression was "possible avulsion of the peroneus brevis tendon versus subacute fracture of the fifth metatarsal base versus foot sprain." He advised the Claimant to follow up with his orthopedic surgeon on June 24, and noted that he might consider an MRI to further evaluate the peroneus brevis tendon. He returned the Claimant to modified duty, noting that he could stand no longer than one hour with 15 minutes seated, and could not squat, kneel, or climb ladders or stairs (EX 3: 32-33).

A note from Dr. Gubernick released the Claimant to light duty from June 25, 1999 to July 16, 1999. The Claimant missed another appointment with Michael Olds, PA-C that was scheduled for July 30, 1999. The record suggests that the Claimant went to physical therapy on July 14, 21, 22, 23 and 30, 1999 (EX 3: 24-29).

An Activity Status Report from Concentra dated September 2, 1999, indicates that Dr. Lukcso diagnosed the Claimant with right ankle sprain. With regard to the Claimant's status, the form indicates: "Regular Activity - Referred, but returning for follow-up visit. Return to regular duty on 09/02/99." The Claimant's anticipated date of MMI was September 16, 1999 (CX 3, 15). Dr. Lukcso's treatment notes indicate that the Claimant had full range of motion in the ankle and metatarsophalangeal joints, with no ecchymosis, erythema, abrasion, or swelling. The Claimant was mildly tender on palpation at the lateral aspect of the right foot and the fifth metatarsal base, though no palpable bony defect was noted. The Claimant's sensation and gait were normal, but the plantar flexion and dorsiflexion were 5/5 with pain. Dr. Lukcso's impression was right foot pain, etiology unclear. He referred the Claimant for an MRI (EX 3: 14-15, 18-19). An undated Concentra Medical Centers form indicates that the Claimant was approved to undergo an MRI on September 3, 1999, at American Radiology (CX 3, 16).

Records indicate that the Claimant missed his follow-up appointment with Dr. Lukcso, which was scheduled for September 9, 1999 (EX 3: 13). The Claimant underwent a urine screen, which appears to have shown THC and PCP; however, the sample was subsequently found to be negative. The Claimant was informed of this negative result on September 30, 1999, and told to report to work on October 1, 1999. (EX 3: 6-12). A second urine screen on October 8, 1999, was negative (EX 3: 4-5).

Medical Release forms place the Claimant out of work for several periods of time. The Claimant appears to have been off work from June 13, 1999 to June 25, 1999 for occupational injury or disease, and released to light duty only until July 16, 1999 (EX 3: 31). He was out of work from July 3, 1999 until some point in August 1999 for occupational injury or disease, and was then released for regular work. The exact date in August is illegible (EX 3: 23). He was out of work from August 6, 1999 to August 10, 1999 for non-occupational injury or disease (cyst removal) and was returned to regular work (EX 3: 22). He was out of work from August 13, 1999 to August 19, 1999 for non-occupational injury or disease (pharyngitis & otitis media) and was returned to regular duty (EX 3: 21). He was out of work from August 27, 1999 to September 2, 1999, for occupational injury or disease and was then released to regular work (EX 3: 16). Another medical release form places him out of work from August 27, 1999, to September 29, 1999, for non-occupational injury or disease. The remarks are unclear, but appear to state that the Claimant was out of work from August 27, 1999 to September 27, 1999 for his ankle, and from September 28, 1999 to September 29, 1999 for "URI" (EX 3: 12). Another medical release form places the Claimant out of work from August 27, 1999 to October 8, 1999, with regular work upon return. The Claimant was noted to have been out from August 27 to September 27, for his right ankle, from September 28 to September 29 for "URI," September 30 for "UDS results," October 4 for his right foot, and from October 5 to October 7 for "see dispensary" (EX 3: 3). The Claimant was out of work from October 15 to 21, 1999, and was released to regular work. The medical release form states that the Claimant was out from October 18 to October 20 for non-occupational injury or disease, though no explanation is given (EX 3: 2). A Certificate of Disability dated October 21, 1999, reflects that the Claimant had flu-like symptoms (EX 3: 1).

Dr. Joseph Connelly

Dr. Connelly saw the Claimant on June 14, 1999. He examined the Claimant's ankle, and found a right ankle sprain. He ordered a bone scan to rule out a fracture (EX 5: 7, 9). Notes from June 22 indicate that the Claimant's bone scan showed a fracture of the right fifth metatarsal. He was referred to Dr. Gubernick and was scheduled to see him on June 25 (EX 5: 6). Dr. Connelly placed the Claimant out of work from June 14, 1999 to June 21, 1999 due to a sprain/strain of the right ankle (EX 5: 8). On June 22, 1999, he placed the Claimant out of work from June 14, 1999 until he was seen by an orthopedic doctor for his fractured right foot. (EX 5: 5). The Claimant was given out of work slips from August 19-12, 1999, for cyst removal; from August 16-19, 1999, for pharyngitis and otitis media; from September 28-29, 1999, for diagnosis of "URI"; and from October 5-7, 1999, for hemorrhoids (EX 5: 1-4).

Dr. Ira Gubernick

In a letter to Dr. Connelly, dated June 25, 1999, Dr. Gubernick noted tenderness at the fifth metatarsal base and "just dorsal to that," pain upon extremes of inversion and internal rotation of the foot, and pain in the lateral aspect of the Claimant mid and hindfoot, which the Claimant said worsened with activity. The rest of the Claimant's foot was non-tender, and only slight lateral edema was noted. Dr. Gubernick did not find a fracture or dislocation on the x-rays brought by the Claimant. He further reviewed the results of the recent bone scan. Dr. Gubernick felt the Claimant should be treated conservatively, and he prescribed a post-op shoe, a functional ankle brace, heat and ice, and an ACE wrap. He also prescribed Ibuprofen and Lortab (EX 4: 5). Dr. Gubernick placed the Claimant on light duty from June 25, 1999 to July 16, 1999 (and July 17, 1999 by note of June 28, 1999), from July 16, 1999 to July 30, 1999 and July 26, 1999 to August 1, 1999. He also prescribed physical therapy on July 16, 1999 (EX 4: 1-4).

Dr. Raymond J. Altieri

Dr. Altieri initially evaluated the Claimant on August 31, 1999. He stated that the Claimant had worked two weeks with an improper diagnosis, and that there was a direct causal relationship between the accident and the injuries sustained. Dr. Altieri noted that the Claimant complained of pain in the lateral fifth metatarsal area upon palpation, both with range of motion and weight bearing. He diagnosed the Claimant with "undiagnosed post traumatic fracture of the right fifth metatarsal." He referred the Claimant to physical therapy, ordered x-rays, prescribed ibuprofen, and ordered that he remain off work until September 7, 1999, the date of his follow-up visit (CX 4: 26-28). The Claimant saw Dr. Altieri on September 7, at which time Dr. Altieri noted that the Claimant's x-ray reports were pending and the Employer-ordered MRI showed edema of the cuboid and a normal peroneus brevis tendon. The Claimant's lateral right foot was still tender, and Dr. Altieri recommended that the Claimant begin physical therapy and remain out of work until his next office visit on September 14, 1999 (CX 4: 18-19).

On September 15, 1999, Dr. Altieiri saw the Claimant and noted that his physical therapy was not authorized, and the Claimant was still experiencing pain in the lateral right foot on palpation and manipulation. He was scheduled for a follow-up visit on September 28, 1999, and ordered to remain out of work until that time (CX 4: 16-17). On September 24, 1999, Dr. Altieri saw the Claimant and noted that his foot was still bothering

him, that he still had pain in the ankle upon walking and with range of motion, and that he still needed physical therapy, for which the Employer had not agreed to pay. He noted that the Claimant would try to return to work on September 27, 1999, and released the Claimant to work without restrictions as of that date. On that same date, he issued a physical therapy order (CX 4: 13-15).

On October 4, 1999, Dr. Altieri saw the Claimant and noted that his foot was giving out at work. The Claimant still experienced pain in the fifth metatarsal, and Dr. Altieri noted that "the doctor who read the bone scan films told me there was a problem with 'marrow edema in the cuboid.'" Dr. Altieri referred the Claimant to Dr. Miller, and scheduled a follow-up visit for October 26, 1999 (CX 4: 11-12). On October 20, 1999, Dr. Altieri saw the Claimant and noted that he had been out of work since October 18. The Claimant was experiencing a great deal of right foot pain. He completed an out of work slip for the Claimant from October 18 to October 20, 1999 (CX 4: 9-10). The Claimant returned again the following day complaining that he was unable to work due to foot pain. He indicated he would try to return to work the following day, and Dr. Altieri issued an out of work slip for October 21 (CX 4: 7-8).

Dr. Altieri saw the Claimant on October 26, 1999, following his appointment with Dr. Miller. He noted that Dr. Miller had referred the Claimant for a CT scan and had prescribed naprosyn and a special boot. He indicated that the Claimant's treatment would depend on the outcome of the CT scan. According to Dr. Altieri, Dr. Miller felt the Claimant had an unhealed fracture requiring treatment. He placed the Claimant out of work from October 21 to October 26, 1999 (CX 4: 5-6). The Claimant was again seen on November 2, 1999. Dr. Altieri noted that the CT scan was positive for a fractured cuboid, and the Claimant's foot had been placed in a cast. The Claimant was to see Dr. Miller again on November 29. Dr. Altieri scheduled a follow-up appointment for November 30, and placed the Claimant out of work from October 26 to November 30, 1999 (CX 4: 1-2, 4).

Dr. Stuart Miller

Dr. Miller first saw the Claimant on October 25, 1999. He noted that x-rays taken about the same time as the injury apparently showed no abnormalities, and a bone scan showed "increased tracer uptake at the lateral side of the mid foot." An MRI taken in September showed a "fracture at the cuboid at the anterior process of the calcaneus." Dr. Miller's examination of the Claimant showed a bony prominence near the base of the right fifth metatarsal, with minimal surrounding swelling. There was also pain on plantar flexion and inversion of the foot. The range of motion was excellent in the ankle and hindfoot, and the anterior drawer test and talar tilt test were negative. No sensory or motor deficits were noted.

Dr. Miller reviewed x-rays, which were essentially normal, with a possible "slight cortical irregularity to the plantar lateral cuboid." The bone scan revealed an increased tracer uptake in the cuboid. Dr. Miller's impression was that the Claimant had sustained a nutcracker type crush injury to his cuboid. In his experience, this type of injury can result in residual arthritis in the calcaneocuboid and cuboid metatarsal joints. Therefore, Dr. Miller advised that the Claimant should undergo a CT scan and get custom molded shoe inserts. In the meantime, the Claimant was fitted with an articulated walking boot (CX 1: 1-2).

Office notes from November 1, 1999, indicate that the Claimant's CT scan showed a through-and-through fracture of the third cuneiform. The scan did not show any bridging, healing or shrinking of the third cuneiform, or whether the cuboid was involved. The Claimant's third cuneiform was very tender on palpation. Based on his reevaluation, Dr. Miller felt that the Claimant's condition was clearly related to his injury. Dr. Miller placed the Claimant in a non-weight bearing cast for four weeks, to be followed by new x-rays, a new ROM walker, and four weeks of physical therapy (CX 1: 3). On November 2, 1999, Dr. Miller indicated that the Claimant should not return to work from October 25, 1999, to November 30, 1999, the date of his next appointment (CX 1: 5).

Office notes from November 30, 1999, show that the immobilization was not successful, and the Claimant had significant pain in the lateral area of his foot. Dr. Miller felt that "ORIF of the nonunion of the lateral cuneiform" and possible calcaneocuboid fusion were necessary. The surgery was to be scheduled at the Claimant's earliest convenience (CX 1: 4).

Office notes from December 28, 1999, indicate that the Claimant was using his ROM walker boot, which allowed him to do some walking, but that if he walked too much his foot would start to bother him. The Claimant had edema, and erythema in the dorsal lateral aspect of his foot, and tenderness and pain in the third cuneiform cuboid area. ROM examination revealed a very painful clicking at the fracture site or the cuneiform cuboid joint. Dr. Miller did not feel that the Claimant could work in his condition. He again indicated that surgical intervention was warranted (CX 1: 6).

Office notes from February 8, 2000, show that the Claimant still had persistent pain and tenderness in his foot. Dr. Miller stated: "He is quite frustrated by the lack of being able to get back to work. He wants to know if he can go back to work and I have stated that he could, but only in his boot. Otherwise he will have too much pain which frustrates him greatly." Dr. Miller indicated that the Claimant could attempt to wean himself from the boot, but that he was eventually going to need surgery, which should help him greatly. The notes indicate that the Claimant was unable to obtain insurance approval for the surgery. Dr. Miller continued the Claimant's limitations (CX 1: 7). In a memorandum written the same date, Dr. Miller noted that the Claimant would be unable to return to work from 8/99 to 4/4/2000 and that his ability to return to work hinged on his surgery (CX 1: 8).

Office notes from April 4, 2000, reveal that the Claimant was still experiencing pain and tenderness in his foot, and was still waiting for insurance approval of his surgery. Dr. Miller noted that he explained to the Claimant that even with the surgery, he may not experience a complete cure and may continue to have problems for some time. He further stated that his problem was fairly complex, and 100% related to his accident.

In a letter written on July 18, 2000, Dr. Miller stated:

> His x-rays of 6/99 clearly demonstrate a pathology in the lateral aspect of the foot. This has been clinically apparent since I began examining the patient. It appears within a very reasonable degree of medical certainty that this problem stems from an injury on the job.

I continue to very strongly advocate open reduction, removal of the bony fragments and possible arthroplasty of the fifth metatarsal cuboid joint.

(CX 1: 10).

Dr. Edward Cohen

Dr. Cohen, who is board-certified in orthopedic surgery (EX 2), examined the Claimant and prepared a report dated December 8, 1999. He performed a physical examination, which showed no swelling, deformity, external sign of injury, or restriction in movement. The anterolateral aspect of the right foot, particularly along the fifth ray, was tender on palpation. Dr. Cohen did not take additional x-rays. His impression was right foot sprain, resolved, and an old right cuboid injury. Based on a reasonable degree of medical certainty, Dr. Cohen found that the Claimant's current complaints were not related to his June injury, as the bone scan performed three months after the injury would have revealed a recent fracture or a non-union, which was not the case. In his opinion, the MRI suggested an old injury. Dr. Cohen did not believe Dr. Miller's surgical recommendation was causally related to the Claimant's June injury. He concluded that the rather extensive work-up that the Claimant had undergone pointed to a chronic pre-existing condition (EX 1: 1-3).

Dr. Cohen gave his deposition on August 17, 2000. He recounted his examination of the Claimant on December 8, 1999, and described the findings on his examination of the Claimant's foot. He also reviewed other medical records sent to him, including reports of the x-rays, bone scan, and MRI, as well as records from Drs. Connelly, Gubernick, Altieri, and Miller. He did not review the CT scan report. It was Dr. Cohen's reasoned medical opinion that the complaints for which Dr. Miller recommended surgery and additional treatment, and the complaint that the Claimant presented to him six months after his injury were not causally related to the occupational or work-related accident of June 3, 1999 (EX 10: 1-16).

Dr. Cohen offered several bases for his opinion. First, the bone scan, which is the most accurate detector of timing of a fracture, showed a subacute fracture, which is one that has been present for from six weeks to three months. The bone scan was taken on June 22, 1999, and the Claimant's on-the-job injury occurred on June 3, a period of only approximately three weeks. He noted that it is possible that a bone scan would not show a very old through-and-through fracture, if that fracture was not causing a reaction and increased blood flow.

Second, the x-rays never showed an injury. An x-ray should show signs of an acute fracture, because as the body heals the fracture, it lays down callous. The x-ray taken in August was still negative. Third, the MRI taken on September 7, 1999, showed "a very small focus on the cuboid bone, again, not adjacent to his area of tenderness or the area of concern." The reader of the MRI felt it could represent a stress fracture, which Dr. Cohen stated forms over a long period of time, rather than from a sudden injury (EX 10: 16-19, 38-39).

Dr. Cohen did not review the CT scan report, but he noted that Dr. Miller felt it showed a through and through fracture of the third cuneiform, which would have been evident in earlier testing. He stated:

> Now, if that has been present and demonstrated on a CAT scan without any evidence on a bone scan of any reaction to, in that particular bone, that has to suggest something that's been there for over six months, because when you start to get really over a year you don't get any other increased blood flow or hyperemia in that kind of area, and so this suggests that x-ray finding had to be there a long time.

According to Dr. Cohen, Dr. Miller also thought that the Claimant might have a problem in the cuboid, and then the base of the fifth metatarsal cuboid joint. Dr. Cohen referred to EX 9, which is a photocopy of the anatomy of the foot, which he had labeled with the various bones referred to by the physicians. Based on the diagram, Dr. Cohen demonstrated that four different areas of pathology had been implicated: the third cuneiform, the calcaneus, the cuboid, and the base of the fifth metatarsal. After labeling the diagram, Dr. Cohen reviewed Dr. Miller's July 18 report, which recommended exploring the bone fragments between the fifth metatarsal joint, which was another separate pathology, bringing the total to five. He did not believe that any of the pathologies could be causally related to stepping in a hole (EX 10: 20-23).

Dr. Cohen felt that the absence of findings on the x-rays suggested that there was not a recent injury. Additionally, the bone scan showed a six week to three month old finding, and the CT scan showed a fracture to a different bone that did not previously appear on either the MRI or the bone scan.[3] He noted that an injury cannot spread from bone to bone, like an infection or poison ivy. "If something is injured, it's injured. It doesn't spread from one to the other." He attributed the Claimant's various diagnoses to his excess weight and/or an injury of which the Claimant was unaware or which he had forgotten to mention. A stress fracture could occur in the "ordinary disease of life," and results from "either body habitus or a lot of stress" (EX 10: 23-26).

Dr. Cohen did not believe that these injuries could have occurred in a chain reaction manner. He felt it was possible that an acute through-and-through fracture could be missed on an x-ray because of bony overlap. However, if there had been a recent fracture of the cuneiform, it would have shown up in the bone scan taken three weeks after the injury. Dr. Cohen would not necessarily have recommended surgery, but he did not take issue with Dr. Miller's recommendation of surgery. He noted that other treatment might include corrective shoes and the passage of time. However, Dr. Cohen was unclear as to what kind of surgery was contemplated, since Dr. Miller first recommended repairing a broken bone, and later recommended exploring a different joint. Dr. Cohen did not believe the proposed surgery was causally related to the Claimant's on-the-job incident. (EX 10: 27-30, 35). He did not believe that the Claimant's injury altered his gait, thus causing some of the problems. Nor did he feel that going back to work two months following the accident would have caused the additional findings. Dr. Cohen felt that there was no question that the Claimant had a preexisting condition, based on the fact that there were few other reasonable explanations for the Claimant's pain (EX 10: 31-35). But even assuming that there was not a pre-existing condition, Dr. Cohen still would maintain that the Claimant's conditions did not come from his accident (EX 10: 38).

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[3] As discussed earlier, Dr. Cohen noted that such a fracture, that shows up on a CT scan but not on a bone scan, has been there for more than six months.

Evidence regarding coverage for surgical procedure

A December 13, 1999, letter from Colleen Pennington, R.N., Case Management, to Dr. Miller states that the Claimant's health insurance would authorize the surgery to repair the Claimant's ankle injury if the claim were denied by workmen's compensation (EX 11). An August 31, 2000, memorandum to Mariene Brown at Baltimore Marine Inc. from Wilma L. Cullen-Fuhr, Account Manager at Fidelity, also confirms that the Claimant's insurance would pay for the surgery if it were denied by workmen's compensation. A handwritten note at the bottom of the memorandum indicates that the authorization was entered into the system on December 6, 1999 (EX 12).

II. Stipulations

The parties have stipulated, and based on the record, I find that:

1. The Act applies to this claim.
2. The Claimant and the Employer were in an employer-employee relationship at the time of the accident/injury.
3. The accident/injury arose out of and in the scope of the Claimant's employment.
4. The accident/injury occurred on June 3, 1999.
5. The Employer was advised of or learned of the accident/injury on June 3, 1999.
6. Timely notice of the injury was given to the Employer.
7. The Employer filed a First Report of Injury with the Secretary of Labor on June 3, 1999.
8. The Claimant filed a timely Notice of Claim.
9. The Employer filed a timely Notice of Controversion on January 24, 2000.
10. Temporary total disability payment were paid from June 17, 1999 to June 24, 1999, at the rate of $226.30 per week, for a total of $258.00.
11. The Claimant's usual employment was shipfitter.
12. The Claimant worked light duty from June 25, 1999 to August 1, 1999. He returned to his usual employment on August 2, 1999, and began losing time again from August 28, 1999, to September 27, 1999; October 4, 1999; and October 25, 1999, to date and continuing.
13. The Claimant's average weekly wage at the time of his accident/injury was $339.45.
14. The Claimant was a five/six day per week worker.

(ALJ 6).

III. Issues

1. Whether the Claimant's current disability is causally related to the accident of June 3, 1999.
2. Whether the surgery recommended by Dr. Stuart Miller is causally related to the accident of June 3, 1999.
3. Whether the Claimant is entitled to temporary total disability benefits from August 28, 1999 to

September 27, 1999; October 4, 1999; and October 25, 1999 to date and continuing.

(ALJ 6).

IV. Discussion

The Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and to draw her own inferences from it. She is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *Reh. Denied*, 391 U.S. 929 (1968); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyard, Inc.*, 14 BRBS 148.9 (1981); *Brandt v. Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Sargent v. Matson Terminal, Inc.*, 8 BRBS 564 (1978).

1. Whether the Claimant's current disability is causally related to his June 3, 1999, injury.

Section 20 of the Act states:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary --
> (a) That the claim comes within the provisions of this Act.

33 U.S.C. § 920.

In *Universal Maritime Corp. v. Moore*, the Fourth Circuit discussed the importance and application of the Section 20(a) presumption. 126 F.3d 256 (4th Cir. 1997). The court noted that in order to invoke the presumption, the claimant must demonstrate that he has an injury that "arose out of and in the course of" his employment. If the claimant puts forth this *prima facie* case, the burden shifts to the employer to produce substantial evidence to rebut the presumption. *Id*. at 262. "Once evidence is presented that could support a finding against [a claimant], the presumption falls out of the case, and the ALJ is required to weigh only the evidence, not the presumption itself." *Id*. at 262-63.

In determining whether the presumption has been rebutted, the employer's rebuttal evidence must be sufficient to sever the causal connection between the injury and the employment. *Bass v. Broadway Maintenance*, 28 BRBS 11, 15 (1994).[4] The employer does not always have to prove another agency of causation in order to rebut the presumption. *O'Kelly v. Department of the Army/NAF*, 34 BRBS 39, 41

[4]In an unpublished opinion, the Fourth Circuit cited with approval the Board's language in *Bass*. *See McClean Contracting Co., Inc. v. Midkiff*, 173 F.3d 851 (4th Cir. 1999) (unpublished table decision).

(2000). The Board has found sufficient for rebuttal a physician's unequivocal finding that the Claimant's disabling condition was not related to his employment. *Kier v. Bethlehem Steel Corp*., 16 BRBS 128, 129 (1984).[5]

Because of the questions concerning the causation of the Claimant's disability, I find it instructive to review in chronological order the events surrounding the Claimant's foot and ankle problems. The Claimant fell in a hole on June 3, 1999, and thereafter reported to the dispensary. His foot was iced, and he was sent to Concentra. At that time, the Claimant had pain in his right foot and ankle. He was returned to regular duty the same day. While the record does not contain a radiologist's report, an x-ray apparently was taken in early June and read as negative. The Claimant was diagnosed with a right ankle sprain. A bone scan taken on June 23, 1999, showed findings consistent with a subacute fracture at the fifth metatarsal base. The radiologist, Dr. Davis, felt this was due to an avulsion of the peroneus brevis tendon. As Dr. Cohen later clarified, Dr. Davis' use of the term "subacute" signaled his belief that the fracture was six weeks to three months old. Dr. Connelly referred the Claimant to Dr. Gubernick, who noted that the Claimant had tenderness at the fifth metatarsal base on June 25, 1999. However, the day before, on June 24, 1999, Dr. Lukcso noted that the Claimant's foot was not tender. Still, Dr. Lukcso did note swelling at the fifth metatarsal base, which he attributed to the bony anatomy. The Claimant also had tenderness at the mid plantar fascia upon direct palpation. The Claimant was treated conservatively by Dr. Gubernick, who prescribed physical therapy and put the Claimant on light duty from June 25 to August 1, 1999. During the month of August, the Claimant was out of work from August 9-12 and August 16-19 for physical conditions unrelated to his June 3, 1999, accident.

Dr. Altieri examined the Claimant and, on August 31, 1999, indicated that there was a direct causal relationship between the Claimant's accident and his injuries. Dr. Altieri also noted pain in the lateral fifth metatarsal area. An MRI ordered by the Employer's physician showed a small area of increased marrow signal in the plantar lateral aspect of the cuboid, which measured less than one centimeter in diameter. The radiologist felt that this could represent the residua of a stress fracture. The MRI showed a normal marrow signal at the fifth metatarsal base and a normal peroneus brevis tendon. Dr. Miller examined the Claimant on October 25, 1999, and found the x-rays to be essentially normal, except for a slight cortical irregularity at the plantar lateral cuboid. Dr. Miller believed that the Claimant had sustained a nutcracker crush injury to the cuboid. However, a CT scan ordered by Dr. Miller subsequently showed a through-and-through fracture of the third cuneiform; he was not sure from the CT scan whether the cuboid was involved. Following unsuccessful immobilization in a cast, Dr. Miller recommended that the Claimant undergo an ORIF of the nonunion of the lateral cuneiform, and possible calcaneocuboid fusion. In a report dated April 4, 2000, Dr. Miller wrote that he was advocating open reduction and removal of the bony fragments, with possible arthroplasty of the fifth metatarsal cuboid joint. He felt that the Claimant's foot condition was causally related to his June 3, 1999, injury.

The Employer disputes a causal relationship, and in support of its argument, has offered the opinion and

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[5]The Fourth Circuit also has cited with approval this Board finding. *See Flood v. BAF Billeting Branch*, 134 F.3d 363 (4th Cir. 1998) (unpublished table decision).

testimony of Dr. Cohen. Dr. Cohen's diagnosis was right foot sprain, which he felt was resolved, and an old right cuboid injury. He did not believe that a subacute fracture to the fifth metatarsal base could be causally related to the June 3 injury, since the bone scan that showed this fracture was taken only three weeks after that date. Similarly, he did not believe that the through-and-through fracture of the third cuneiform could be related to the June 3 injury because, while the fracture could be missed on a normal x-ray, the bone scan would have picked it up if it were an acute fracture. Therefore, an acute fracture to the third cuneiform could not have occurred on June 3. It was Dr. Cohen's strong belief that the Claimant had a preexisting injury.[6]

Reviewing the chronological order of events, it is clear that the Claimant has made a prima facie case for invocation of the Section 20(a) presumption. He clearly has an injury to his foot, and he clearly fell in a hole on June 3, 1999, circumstances which could have caused, contributed to, or aggravated an injury. The question is whether the Employer has submitted sufficient evidence to rebut that presumption. I find that the Employer has done so. Dr. Cohen's explanation of the sequence of events is based on the objective evidence, mainly the radiological evidence, which consists of x-rays, a bone scan, an MRI and a CT scan. He clearly explained how each of the five different pathologies (other than ankle sprain) that were diagnosed could not be attributed to the June 3 incident.

The presumption having been rebutted, I am required to make a determination based on all of the evidence as to whether the Claimant's disability is causally related to his June 3, 1999, injury. I conclude that it is not. I find that Dr. Cohen's comprehensive opinion, which discusses all of the evidence, and explains how each different pathology (other than ankle sprain) as diagnosed by the Claimant's physicians cannot be related to the June 3, 1999 injury, is very persuasive, and I accord it determinative weight. As stated above, Dr. Cohen provided clear, compelling reasons, based on the objective evidence, why each diagnosis (aside from a sprain) could not be attributed to the Claimant's June 3 injury. In contrast, Dr. Gubernick and Dr. Connelly did not even relate their diagnoses to the Claimant's work related injury, and Dr. Miller and Dr. Altieri provided no objective basis for their determinations that their various diagnoses were causally related to the Claimant's June 3, 1999, injury.

I note at the outset that none of the standard x-rays ever showed any sort of pathology.[7] According to Dr. Cohen, these tests establish that there has been no recent fracture, because the x-ray would show callous formed by the healing of a recent fracture. The bone scan (which, according to Dr. Cohen, is the most accurate method of determining the timing of a fracture) taken on June 23 showed a subacute fracture of the fifth metatarsal base. Dr. Cohen explained that a subacute fracture is one that is from six weeks to three months old; therefore, this injury could not have been sustained on June 3, 1999. An MRI taken in September showed a small focus of increased marrow signal in the plantar lateral aspect of the cuboid, a finding which the reader felt could be consistent with the residua of a stress fracture in the cuboid. According to Dr. Cohen, a stress fracture

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[6] There is no evidence in the record to suggest that the Claimant was treated for any injury to his ankle before the June 3, 1999 incident.

[7] The only x-ray radiologist report in the record is from the August 1999 x-ray.

is occasioned by body habitus or lots of stress, as opposed to an acute injury. A CT scan[8] showed a through-and-through fracture of the cuneiform. Dr. Cohen noted that this fracture could have been obscured on x-ray because of bony overlap. However, there was no evidence of the fracture on the original bone scan or on the MRI. According to Dr. Cohen, if the fracture had been occasioned by the June 3 incident, it would have been apparent on the bone scan. Thus, the fracture had to have been either very old or not in existence on June 3, 1999. Before obtaining the CT scan, which showed the fracture of the cuneiform, Dr. Miller felt the Claimant had a nutcracker type crush injury to his cuboid, although it is not clear whether this diagnosis was based on the June bone scan or the September MRI; in any event, neither radiologist who initially read the diagnostic images found a nutcracker type crush injury to the cuboid.

None of the physicians who treated the Claimant offered any testimony in the case. In their treatment notes and reports, Drs. Connelly and Gubernick did not specifically attribute the Claimant's condition to a work-related injury. Dr. Altieri stated that the Claimant's condition was causally related to his work-related injury, but he offered no reasoning for this conclusion. Dr. Miller similarly concluded that the Claimant's condition was causally related to his work-related injury, based on the Claimant's history and the type of injury, but he did not further elaborate. In contrast, Dr. Cohen addressed each specific diagnosis in turn, and discussed in detail how the objective evidence established that the diagnoses could not be attributed to the June 3 incident.

While there seems little doubt that the Claimant has serious problems with his foot, Dr. Cohen's report and testimony, on which I rely, clearly established that none of the physiological conditions, other than ankle sprain, can be attributed to the June 3 incident. Accordingly, I find that the current and unresolved physiological findings in the Claimant's foot are not causally related to his June 3, 1999, incident.

2. Whether the surgery recommended by Dr. Stuart Miller is causally related to the accident of June 3, 1999.

As I have concluded that none of the physiological findings currently present in the Claimant's foot are causally related to his June 3 incident, it necessarily follows that the Claimant's recommended surgery is not causally related to the June 3, 1999, incident, and therefore, is not compensable.

3. Whether the Claimant is entitled to temporary total disability benefits from August 28, 1999 to September 27, 1999; October 4, 1999; and October 25, 1999 to date and continuing

While the Claimant's current disability is not related to his June 3, 1999, work-related incident, this does not completely resolve the issue of the Claimant's entitlement to temporary total disability benefits for periods of time following the injury. I must determine the nature and extent of the Claimant's disability throughout the specific time periods alleged by the Claimant. The Claimant's initial injury was variously described as a sprain or strain of the right ankle and/or foot. Dr. Cohen did not refute this finding, but rather noted only that the sprain

[8]The record does not contain a radiologist report for the CT scan.

had resolved by the time of his evaluation of the Claimant. As there is no contradictory evidence in the record, I find that the now-resolved sprain/strain of the right ankle and/or foot was causally related to the June 3, 1999, incident. Therefore, I will consider whether the Claimant is entitled to benefits for any of the above periods of time, based solely upon a disability occasioned by the sprain/strain.

The Claimant must prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). The determination of when maximum medical improvement is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2nd Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). An employee reaches maximum medical improvement when his condition becomes stabilized, or when he is no longer undergoing treatment with a view toward improving his condition. *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395 (1981); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (5th Cir. 1994).

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

The Claimant has alleged that he is entitled to temporary total disability benefits for the period of time from August 28, 1999, to September 27, 1999. A review of the record shows that on September 2, 1999, Dr. Lukcso noted that the Claimant had a right ankle sprain. Dr. Lukcso felt the Claimant could return to regular duty on that date, and that he would reach maximum medical improvement on September 16, 1999. Dr. Lukcso also referred the Claimant for an MRI. The record contains an undated medical release form completed by Tracy Fowler, which shows that the Claimant was out of work from August 27 to September 2, 1999, for an occupational injury or disease. Another medical release form completed by Ms. Fowler places the Claimant out of work from August 27 to September 29, 1999, for a non-occupational injury or illness. Handwritten notes state that the Claimant was out of work until September 27, 1999, for his right ankle.

Though Dr. Lukcso released the Claimant to regular duty on September 2, 1999, the Claimant did not

return to work, and the MRI showed edema of the cuboid. The Claimant was being treated by Dr. Altieri during this period of time for "undiagnosed post traumatic fracture of the right fifth metatarsal." While on one occasion Dr. Altieri noted that the Claimant continued to experience pain in his right ankle, no diagnosis of sprain/strain seems to have been entertained by Dr. Altieri. Ultimately, in spite of the pain, Dr. Altieri released the Claimant to work without restrictions on September 27, 1999.

During the period of time from August 28, 1999, to September 2, 1999, the medical release form states that the Claimant was out of work due to a work-related injury. Therefore, I find that the Claimant established a prima facie case of total disability during that time. The Employer provided no evidence regarding suitable alternate employment for that period of days; therefore the Claimant is entitled to total disability benefits. Dr. Lukcso opined that the Claimant would reach maximum medical improvement on September 16, 1999. In the absence of countervailing evidence, I conclude that the Claimant's disability due to his ankle sprain was temporary in nature during the period of August 28 to September 2, 1999. Therefore, I find that the Claimant is entitled to temporary total disability benefits from August 28, 1999 to September 2, 1999.

After September 2, 1999, there is no evidence that the Claimant could not perform his regular duties as a result of a work-related injury, that is, his ankle sprain[9]; therefore, he would not be entitled to any temporary partial benefits from the period of September 2 to September 16, 1999.

Dr. Lukcso was the last physician to diagnose a sprain/strain. Dr. Altieri and Dr. Miller diagnosed the Claimant with conditions that have been found unrelated to the June 3, 1999, work-related incident. Accordingly, I find that the Claimant is not entitled to temporary total disability benefits for the remaining periods of time.

Accordingly, it is hereby ORDERED that the Employer pay to the Claimant temporary total disability benefits for the period of August 28, 1999, to September 2, 1999.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge

[9]In fact, the Claimant had been performing his regular duties during various periods of time in the month of August. The Claimant missed substantial amounts of time during the month of August, but that missed time was attributed to other health-related concerns (EX 3: 21-22).